No. 83-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY LOUISE SEAY, a/k/a
MARY LOUISE DERRINGER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

RAY P. MCCLAIN
Counsel of Record
100 Broad Street, Suite 200
Post Office Box 608
Charleston, S.C. 29402
(803) 577-3170

JOHN D. DELGADO
1918 Marion Street
Columbia, S.C. 29201
(803) 771-8774
Attorneys for Petitioner

May 25, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The response of the Solicitor General suggests discomfort with the result in this case, by "recogniz[ing] that the evidence in this case regarding petitioner's marital status and her knowledge thereof was borderline" (Brief in Opposition, 6). Yet the government seeks to uphold the palpably unjust result below by arguing that the result is "fact-bound," and that the facts are sufficient to justify the verdict.

To the extent that the result is "fact-bound," this case, of course, does *not* warrant review in this Court, although, as we argue below, a sense of justice would sug-

gest that this Court should certify the "fact-bound" question of state law to the South Carolina Supreme Court. The Petitioner can be guilty of an offense only if, under the unique provisions of South Carolina court decisions, she had entered a common-law marriage in South Carolina (a marriage relation that cannot be contracted in a majority of states). The State Court should be asked to give an authoritative ruling on its law.[1]

The fact that the government's response seeks to focus on evidence, however, serves to accentuate the fact that the government has not responded at all to the principal arguments of the Petition: (1) that an ambiguous question cannot lawfully produce a criminally false answer, even if the jury thought the answer was false as the defendant understood the question, and (2) the concept of "common law marriage," particularly where marriage was defined "according to what we believe to be the law of God," is too vague to define a standard of criminal liability.

1. The interests of justice argue strongly for certification of the question of the existence of a common-law marriage, uniquely subject to definition by the State, to the South Carolina Supreme Court.

As the Solicitor General notes in his Opposition, 11, the Supreme Court of South Carolina, under Rule 46 of its Rules, has discretion to answer a question of law certified to it by a federal court. Whether the evidence of record, viewed in the light most favorable to the prosecution, was sufficient to prove, beyond a reasonable doubt,

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[1] There are no South Carolina statutes to guide persons as to when they have or have not entered a common-law marriage. Petitioner is a grandmother who, the record reflects, held herself out as an unmarried person consistently in all business and personal affairs, except at her church and, on occasion, to one son-in-law, who was divorced by her daughter before the son-in-law asked the Department of Labor to investigate Petitioner. See Petition, 3-4.

the existence of a common-law marriage, is a question of law.[2] Cf. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The government concedes that, at best, "the evidence regarding Petitioner's marital status . . . was borderline . . ." (Opposition, 6). The government has emphasized throughout that Petitioner's marital status is a matter peculiarly defined by state law, so that she can be prosecuted based upon a common-law marriage valid in South Carolina, even though most states no longer recognize such marriages, Petition, 11a-12a. But only the South Carolina Supreme Court can determine reliably whether under South Carolina law the evidence in this case was sufficient to sustain a finding, based on proof beyond a reasonable doubt, that Petitioner's relationship to Coke Seay was a common-law marriage.

In sum, the government has strongly emphasized the role of peculiar state laws in defining Petitioner's marital status. The government has conceded that the evidence is "borderline." The interests of justice at least require that the highest court of the State be invited to determine whether the courts below have properly applied South Carolina law of common-law marriage as a predi-

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[2] A certified question might properly be framed in the following language:

> "Was the evidence of record in this case, summarized in the attached statement of facts and set forth in the record herewith transmitted, sufficient for the jury to find that the existence of a common-law marriage, as defined by South Carolina law, had been proved beyond a reasonable doubt?"

The relevant evidence, assuming all of the government's evidence to be true, would constitute the "findings of fact." A stipulated statement of these facts could, in all probability, be agreed by the parties based on the summaries in the Petition, 3-4, and the Opposition, 3-4. Rule 46(4) of the South Carolina Supreme Court provides that the record, or any portion of it, may be filed together with the order certifying the question.

cate for convicting Petitioner of fraud and false statement.

2. The decision below conflicts with the decisions of other Courts of Appeals.

The government suggests that the decision below is consistent with prior decisions because in this case the jury could have found that the Petitioner understood the ambiguous question (Opposition, 10, n. 8). But the fundamental rationale of the decisions at issue is that "a person does not answer official questions at his peril," leaving a jury free to find that he actually understood it to mean what the government contends it meant. *United States v. Diogo*, 320 F.2d 898, 906, (2d Cir. 1963).

The fundamental ambiguity of the form Petitioner signed has been recognized by the Department of Labor, which is revising that form to refer expressly to common-law marriages (Opposition, 8, n. 5). Although changing that form may avoid repetition of these precise facts, the government does not, and cannot, dispute Petitioner's contention (Petition, 12, 30a-31a) that millions of Americans are potentially at risk if they can be jailed because a prosecutor and a jury believe that a claimant understood an ambiguous question on a government form to require a different answer from the answer stated.

Where there is a conflict between circuits, this Court has exercised its jurisdiction, even where some of the conflicting decisions are *within* a circuit. *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977). This is not a pure "intracircuit" conflict: the leading conflicting decisions are from the Second and Eighth Circuits, whereas the decision below was from the Fourth Circuit. The fact that a prior panel of the Fourth Circuit adopted the prevailing standard in *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980), and the majority of the divided panel below ignored that standard, does not destroy the conflict between this decision and the decisions

of other circuits.[3] Cf. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (intracircuit conflict).

3. The concept of common-law marriage, existing "according to what we believe to be the law of God," is void for vagueness.

Petitioner, and the dissenting panel member of the Court of Appeals, have argued that the instruction to the jury that South Carolina defines a common-law marriage "according to what we believe to be the law of God" (Petition, 14, 23a) rendered the concept void for vagueness. The government has not responded to this argument. Therefore, the government's argument that the jury found Petitioner "knew" she had entered a common-law marriage (Opposition, 10-11) is fundamentally flawed, because any such finding was inextricably entwined with the definition of a common-law marriage "according to what we believe to be the law of God."

CONCLUSION

The petition for writ of certiorari should be granted, or the petition should be held in abeyance while the South Carolina Supreme Court is invited to answer a certified question to determine whether Petitioner did enter a common-law marriage under South Carolina law.

RAY P. MCCLAIN
Counsel of Record
100 Broad Street, Suite 200
Post Office Box 608
Charleston, S.C. 29402
(803) 577-3170

JOHN D. DELGADO
1913 Marion Street
Columbia, S.C. 29201
(803) 771-8774

Attorneys for Petitioner

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[3] This Court's rules provide for considering review "When a federal court of appeals has rendered a decision in conflict with the decisions of another federal court of appeals on the same matter . . ." Rule 17(a). Such a conflict exists in this case.